IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.80 OF 2003

Suresh Baburao Pawar ... Appellant

Vs.

Shailaja Shivaji Gada ... Respondent

WITH

FAMILY COURT APPEAL NO.35 OF 1999

WITH

CIVIL APPLICATION (M) NO.37 OF 2004

Shailaja Shivaji Gada ... Appellant

Vs.

Suresh Baburao Pawar ... Respondent

Mr. P.D. Joshi for the appellant in Family Court Appeal No.80 of 2003 and respondent in Family Court Appeal No.35 of 1999 and Civil Application (M) No.37 of 2004.

Mr. G.S. Godbole for the respondent in Family Court Appeal No.80 of 2003 and appellant in Family Court Appeal No.35 of 1999 and Civil Application (M) No.37 of 2004.

CORAM: SMT. RANJANA DESAI, &
V.M. KANADE, JJ.

DATED: 15TH SEPTEMBER, 2004.

P.C.:-

1. Suresh Baburao Pawar - appellant in Family Court Appeal No.80 of 2003 is the respondent in Family Court Appeal No.35 of 1999. Shailaja Shivaji Gada, who is the respondent in Family Court Appeal No.80 of 2003 is the

appellant in Family Court Appeal No.35 of 1999. Admittedly, their marriage is dissolved by a decree of divorce. They have two sons - Yuvraj and Digvijay. For the sake of convenience, we shall refer to Suresh Pawar as "the father" and Shailaja Gada as "the mother".

2. Family Court Appeal No.35 of 1999 filed against order dated 18/7/1998 modifying the decree dated 19/9/1996 so far as it related to the custody of children, was disposed of in terms of consent terms filed on 5th/12th August 1999. By this order, the father was to keep the permanent custody of both the sons Yuvraj and Digvijay till they attain the age of majority and the mother was granted access on the terms set out in the order.

3. Civil Application No.9615 of 1999 was filed by the mother seeking permanent custody of the children. By order dated 16/2/2000, the final order dated 5th/12th August, 1999 as regards access came to be modified by a Division Bench of this court. The mother sought review of this order by filing Civil Application No.3596 of 2000. After hearing the parties, on 17/6/2000, the order of access was varied by a Division Bench of this court to which one of us (Smt. Ranjana Desai, J.) was a party. Civil Application No.7434 of 2000 was filed by the father seeking review of the order dated 17/6/2000. By order dated 13/11/2000, the said civil application was dismissed by a Division Bench of this court to which one

of us (Smt. Ranjana Desai, J.) was a party. The father filed one more civil application being Civil Application No.39 of 2001 seeking modification of the earlier order. A Division Bench of this court on 3/5/2001 ordered that the appeal be finally heard. It appears that the fact that the appeal was disposed of by order dated 5th/12th August, 1999 was not brought to the notice of that Division Bench. The matter again appeared before another Division Bench. Unfortunately, again the fact that the Family Court Appeal No.35 of 1999 was disposed of was not brought to the notice of that Bench and, hence, the appeal was placed for final hearing before Division Bench of V.C. Daga & J.P. Devadhar, JJ. On 9/8/2002, that Division Bench after noting the chronology of orders, observed that the appeal has been already disposed of on 5th/12th August, 1999 and that nothing is pending before this court for being heard. Family Court Appeal No.35 of 1999 was ordered to be treated as disposed of.

4. It appears that the father took out Execution proceedings for execution of the decree dated 19/9/1996 passed by the Family Court. On 30/6/2003, the Family Court dismissed the said application holding that the matter stood concluded by this court's order dated 9/8/2002. The said order is challenged by the father by filing Family Court Appeal No.80 of 2003. The said appeal was placed before the Division Bench of D.K. Deshmukh & S.J. Vazifdar, JJ.) on 24/11/2003. That

Division Bench again noted all the orders passed by different Benches and observed that the debate was whether the order dated 17/6/2000, which was passed by a Division Bench of this court to which one of us (Smt. Ranjana Desai, J.) was a party, has the effect of modifying the consent decree and, therefore, it would be appropriate if the appeal is fixed before the Division Bench of which Smt. Ranjana Desai, J. is a party. The office was directed to seek appropriate orders from the Hon'ble the Chief Justice. Accordingly, the office placed these matters before the Hon'ble the Chief Justice. As per order dated 26/2/2004, passed by the Hon'ble the Chief Justice, these matters are placed before us.

5. We have interviewed the father and the mother on number of occasions. We have also interviewed their sons Yuvraj and Master Digvijay. We have heard the learned counsel appearing for the father as well as the mother. The only question with which we are concerned is the right of the father to have access to his younger son Master Digvijay, who is still a minor.

6. After interviewing the sons, we are of the opinion that both the sons are not averse to the idea of visiting their father or, even on occasions, staying overnight with him. On 26/3/2004, as an interim arrangement, we

had directed Master Digvijay to go to the father's house on Sunday, the 28/3/2004 at about 10.00 a.m. We had asked him to stay there upto 6.00 p.m. We were informed that this order was complied with. The matter was then placed before us on 7/4/2004. We again heard the parties. We directed the office to place this matter before us on 5/5/2004. We were informed by Master Digvijay that though he is willing to go to his father, since he has to attend classes and, the timings of the classes are not certain, it may not be possible for him to abide by the fixed schedule given by this court. We, therefore, directed him to visit his father between 2.00 p.m. to 6.00 p.m. on every Sundays. On 5/5/2004, the same arrangement was directed to be continued. On 8/6/2004, while directing that the matter be placed on 8/7/2004, we had again ordered that the same arrangement should continue till 8/7/2004. We had expressed that it would be in the interest of the parties and the children if the children stay overnight in the father's house twice in a month for the time being. On 8/7/2004, we heard the learned counsel for the parties. We asked them to examine the possibility of arriving at some arrangement as regards the access which would not hamper the studies of Master Digvijay. Thereafter, the matter was placed before us on 12/8/2004. On that day, both the counsel informed us that it was not possible for them to arrive at any mutually acceptable arrangement. In the circumstances, it is necessary for this court to now make

some arrangement, which will last till Master Digvijay attains majority.

7. We have already noted that both the sons have told us that they love their father and that they would like to spend time with him. Though we are only concerned with the question of access of the father to Master Digvijay, who is a minor, just to make it easier for him we had asked his brother Yuvraj, who is a major to accompany him to the father's house, if possible. Accordingly, both the brothers have visited the father and spent time with him. It is true that Master Digvijay should spend more time with his father but after interviewing Master Digvijay, we have realised that it will not be possible to direct him to visit the father on any fixed day or stay with him overnight on a particular day. Master Digvijay has been regularly attending the classes. We cannot be oblivious of the pressure of studies under which the present day students work. Master Digvijay's schedule is as follows:

Monday	-	classes - 07.00 a.m. to 09.30 a.m. college - 09-55 a.m. to 06.10 p.m.
Tuesday	-	college - 09.55 a.m. to 06.10 p.m.
Wednesday	-	classes - 07.30 a.m. to 10.00 a.m. college - 01.50 p.m. to 06.10 p.m.
Thursday	-	college - 02.30 a.m. to 06.10 p.m.
Friday	-	classes - 06.30 a.m. to 09.30 p.m college - 11.15 a.m. to 06.10 p.m.

Saturday - classes - 07.00 a.m. to 09.00 a.m
college - 02.30 p.m. to 06.10 p.m.

Sunday and holidays - classes will be approximately 5 to 6 hours. the time is not fixed.

In such a situation, we cannot allow the studies of Master Digvijay to be affected on account of our order directing him to visit the father's house on a fixed day. We had asked him whether he is willing to stay with his father permanently. He was not willing to do so for according to him it is easier to go to his college and classes from his mother's house. At this crucial stage of his life, we would not like to uproot him from his surroundings by our order. After interviewing the father, we could gather that even he would not like his sons' studies to suffer.

8. We can, therefore, only direct Master Digvijay to try and spend as much time as possible with his father in such a manner as would not hamper his studies after adjusting timings of his classes. Ideally, he should spend atleast one night in a month in his father's house. Apart from this, he should, by prior arrangement, spend atleast two hours with his father on any mutually convenient day once in 15 days. We cannot by our order bind Yuvraj, who is a major. But we would appreciate if he accompanies his brother Master Digvijay. We are informed by Master Digvijay that in Diwali, Christmas and

Summer vacations, he plays football. That means, he has some free time during vacations. With prior arrangement with the father, he should spend four days in each of these vacations with his father. The parties must understand that this arrangement is flexible and would work well by mutual understanding and co-operation. This arrangement should continue till Master Digvijay becomes a major. We hope that the father, the mother and both their sons abide by this order as that would be in the interest of all.

9. We cannot part with these matters without referring to the observation made by the Division Bench of D.K. Deshmukh & S.J. Vazifdar, JJ. in Family Court Appeal No.80 of 2003 in R.D. o.150 of 2003. In its order dated 24/11/2003, the Bench observed that the orders dated 3/5/2001, 18/1/2002 and 22/4/2002 in Appeal No.35 of 1999 are made by the Division Bench to which one of us (Smt. Ranjana Desai, J.) was a party without noticing that the appeal has already been disposed of. Unfortunately, section 26 of the Hindu Marriage Act was not brought to the notice of the learned judges. We are sure that if it was brought to the notice of the learned judges, they would not have made the above observation. Under section 26 of the Hindu Marriage Act, even after disposal of the appeal, the court can always revoke, suspend or vary any orders or provisions made with respect to the custody, maintenance and education of minor children. Various

orders passed on the civil applications modifying the order of access are under section 26 of the Hindu Marriage Act. In fact, it is keeping in mind section 26 of the Hindu Marriage Act that we have entertained Civil Application No.37 of 2004. Needless to say that with the present order, it stands disposed of.

10. In view of the above, Family Court Appeal No.80 of 2003 does not survive and is disposed of as infructuous.

(SMT. RANJANA DESAI, J.)

(V.M. KANADE, J.)